Punitive Damages in the Competing Reform Drafts of the French Civil Code

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1. Introduction

'Obviously disproportionate' was the description given by the *Cour de cassation* about a 1,460,000 USD punitive award ordered by the Supreme Court of California (County of Alameda), in addition to 1.8 million USD compensatory damages, against a French manufacturer for non-performance of a 826,000 USD deal concluded with American purchasers.[1] The *Cour de cassation* confirmed the exequatur refusal of the Californian decision on the ground that:

> 'if a condemnation to pay punitive damages is, as such, not contrary to public order, it is otherwise when the amount of damages is obviously disproportionate compared to the harm suffered and the contractual breach' (transl. CM).

The reasoning of the French Supreme Court echoes the cautious admission of punitive damages by three recent competing reform drafts of the *Code civil*.[2] These drafts all contain a punitive damages provision revealing a consensus, among the drafters, about the admissibility of this common law concept within French civil liability. French private

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1 Cass. 1e civ., 1 décembre 2010, n° 09–13303, (Epoux X – Rejet pourvoi c/CA Poitiers, 26 février 2009), available at: www.legifrance.fr. About the enforcement of US punitive damages awards in Belgium, Germany and Italy, see Evelien de Kezel's contribution in this book.

2 These drafts are, chronologically presented:
(1) The 'Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil), Rapport à Monsieur Pascal Clément, Garde des Sceaux, Ministre de la Justice', from September 2005, supervised by Prof. Catala and Viney and published at www.justice.gouv.fr/Art_pix/RAPPORTCATALASEPTEMBRE2005.pdf;
(2) The '*Proposition de loi n° 657 portant réforme de la responsabilité civile*' from July 2010 (www.senat.fr/dossier-legislatif/ppl09–657.html), and;
(3) The Draft published in '*Pour une réforme du droit de la responsabilité*', Paris: Dalloz 2011, under the supervision of Prof. Terré.

law indeed, is not at odds with repressive mechanisms.[3] Still, the design of these provisions betrays a reluctance towards the allowance of damages which are out of proportion with the losses caused.

Indeed, punitive damages fundamentally depart from the exclusively compensatory function of French civil liability summed up in its founding principle of '*réparation intégrale*' or full reparation.[4] According to this traditional reparation rule, damages aim at repairing 'all, but no more than, the harm suffered': they must neither lead to profit, nor to losses for the victim ('*ni perte, ni profit pour la victime*') and are not linked to the gravity of the damaging behaviour.[5] But sanctioning the seriousness of certain damaging behaviour is precisely what all three drafting groups are aiming for when adopting a punitive damages provision. No consensus emerges from these drafts, however, as to the damaging behaviour(s) to be sanctioned and the features of the sanction itself (e.g. calculation basis, upper limit, beneficiaries, insurability). This paper offers a comparative analysis of the three competing punitive damages provisions, each establishing a different balance between the call for a punitive mechanism as private enforcement tool and the continued loyalty towards the traditional compensatory function of civil liability. After an overview of the respective fundamentals of the competing reform drafts (par. 2), follows a detailed comparison of their respective punitive damages provision (par. 3).

2. The Competing Reform Drafts – General Highlights

In July 2010, the First Legislative Chamber registered a new bill proposal – hereafter the Béteille Proposal[6] – the purpose of which is to reform and codify present tort law. Its punitive damages provision is to be found in Article 1386–25 Béteille Proposal.[7] This

3 See Borghetti 2009. This author describes a series of punitive mechanisms one encounters in French civil law, among which a contractual mechanism such as penalty clauses (*clauses pénales*) or a more general device like civil fines. Civil fines are defined as 'provided for in a civil statute (…) and to which one can be sentenced by a civil court' (Borghetti 2009, § 18) when the litigious conduct do also not constitute a criminal offence. French law distinguishes civil fines from criminal fines and administrative fines (see Behar-Touchais 2002, § 8–14). They are a serious competitor to punitive damages. However, contrary to punitive damages, their amount often remains low. There is one major exception though: Article L. 442–6-III Commercial Code provides that those who infringes certain prohibited practices in business-to-business relations can be ordered to pay a fine up to € 2 million. He further discusses the 'widely shared belief' in the existence of a judicial practice of covert punitive damages award taking in order to take into account – in violation of the full reparation rule – of the seriousness of the defendant's behaviour and/or the gain he or she thereby achieved, Borghetti 2009, § 22–29.

4 E.g. Cass. 2e civ., 23 janvier 2003, Bull. civ. II n° 20.

5 E.g. Fabre-Magnan 2004, n° 338, Le Tourneau & Cadiet 2007, n° 2523s. An exception to this principle exists, though, in case of fraudulent breach of contract (Article 1150 *Code civil*, *faute dolosive*) e.g. a deliberate non-performance of a contractual obligation combined with the promisor's intention to harm. In that case, the promisor might be condemned to compensate foreseeable as well as unforeseeable damages suffered by the promisee, see e.g. Fabre-Magnan 2004, § 217, Vignolle 2010, § II.A.

6 The proposal is named after the First Chamber member Laurent Béteille who initiated it. It has not been submitted to voting yet.

7 Article 1386–25 provides that:
'In cases where the law expressly provides so, when the damage results from a deliberate wrongdoing or

proposal follows up an information report of the First Legislative Chamber Law Commission on the reform of French civil liability – hereafter Béteille & Anziani report.[8] The Béteille Proposal 'translate[s], into legislative form' the recommendations of that prior report.[9] The Béteille & Anziani report and Béteille Proposal both follow in the footsteps of the *Avant-Projet de réforme du droit des obligations* published in 2005 under the leadership of Professor Catala – hereafter Catala Draft – which contains a punitive damages provision at Article 1371 Catala Draft.[10] In 2010, a third reform draft was officially submitted by the so-called Terré drafting group to the Minister of Justice and published in March 2011 – hereafter the Terré Tort Draft. Punitive damages are codified in Article 69 al. 2 Terré Tort Draft.[11] While the Béteille Proposal originates from a

a deliberate breach of contract and has lead to an enrichment of the wrongdoer resp. promisor that the sole compensatory damages cannot eliminate, the judge can condemn, by a motivated decision, the inflictor of the damage to the payment, in addition to compensatory damages for the harm suffered in accordance with Article 1386–22, of punitive damages, the amount of which may not stand out twice the amount of the compensatory damages.
According to shares decided by the judge, the punitive damages are respectively paid to the victim and to a fund which purpose is to compensate harm similar to the one suffered by the victim. When such a fund does not exist, the share of the punitive damages which is not attributed to the victim should be paid to the Treasury'. (Transl. CM).

8 Anziani, A. & Béteille, L., Rapport d'information fait au nom de la commission des lois constitutionnelles par le groupe de travail relative à la responsabilité civile, n° 558 (2008–2009), released in July 2009 (www.senat.fr/notice-rapport/2008/r08–558-notice.html). Laurent Béteille and Alain Anziani, both former lawyers, are respectively right-wing and left-wing members of the Working Group on Tort Law, part of the First Chamber law commission, created in November 2008. Among the three most recommended innovations is the allocation of punitive damages in case of lucrative faults, See Anziani & Béteille 2009, Recommendation n° 24, p. 7.

9 Béteille Proposal, Exposé des motifs, p. 3. The Béteille Proposal contemplates the replacement of the present Article 1382 up to Article 1386 by no less than 66 new provisions. Revised Chapter II – Fourth Title, Third Book – of the Civil Code, entitled 'De la Responsabilité', clearly indicates that, like the Catala Draft, its scope stretches out beyond tort to contractual liability. This fundamental direction dictates the rephrasing of Article 1382 where the notion of non-performance of a contractual obligation makes its entry. Article 1382 would then sound: 'Tout fait quelconque de l'homme ou toute contravention à une obligation contractuelle, qui cause à autrui un dommage, oblige son auteur à le réparer'. After a first section comprising of general provisions, a second one is dedicated to the conditions for one to be held liable. The third section concentrates on the effects of one's liability and the last section deals with two specific liability regimes: product liability and liability for traffic accidents.

10 Article 1371 Catala Draft provides that:
'One whose fault is manifestly [deliberate], particularly a [lucrative fault], may be ordered to pay punitive damages besides compensatory damages. The judge may direct a part of such damages to the Treasury. The judge must provide specific reasons for ordering such punitive damages and must clearly distinguish their amount from that of other damages awarded to the victim. Punitive damages may not be the subject of a contract of insurance' (Transl. CM).
This translation departs from the official one proposed by Levasseur (Levasseur 2008, p. 86) because it is, in my view, not faithful to the original text on two decisive elements, namely the translation of *délibéré* as premeditated and the replacement of the expression *faute lucrative* by an improper description.
About Article 1371 Catala Draft, see Rowan 2009, p. 325 ff, Rowan 2010, p. 513–517 and Borghetti 2009, § 34–46.

11 Article 69 Terré Tort Draft reads as follows:
'Subject to any specific provision, the form and amount of the reparation may have a symbolic reach.

legislative body, the Catala Draft and the Terré Tort Draft are both initiatives of university scholars; the only difference being that the latter group is composed of an equal number of university scholars and legal practitioners. The present paragraph provides for further insights on the respective general background of the competing punitive damages provisions which are examined in par. 3.

2.1. Scope of Application and General Purpose of the Reform

The *Catala* Draft considers reforming contract law, tort law and prescription law as well.[12] The drafters' general purpose is not to depart from the positive law derived from Articles 1382–1386 of the *Code civil* but rather to adjust it ('*le changement dans la continuité*'): codification through the consolidation of case law is the motto.[13] This especially reflects the approach followed by the drafters of the 60 tort law provisions, headed by Professor Viney.[14] The Béteille Proposal which comprises of contractual and non-contractual liability rules opts, like the *Catala Draft*, for the consolidation of judge made tort law.[15] The *Terré Tort Draft* focuses on non-contractual liability rules but is part of a wider reforming endeavour of the French law of obligation which resulted, in 2009, in a reform draft on contract law – hereafter *Terré Contract Draft*.[16] In contrast with the *Catala Draft* and the Béteille Proposal, it seeks to re-codify French tort law by restructuring it rather than by consolidating existing case law.[17]

2.2. The Drafts' Preparatory Works

The text of the Catala Draft encloses preliminary comments regarding its major orientations. Unfortunately, the comments on the tort law chapter are silent about the motives leading to the adoption of a punitive damages mechanism,[18] nor do these comments throw light on its specific features such as its scope of application or the beneficiaries of the award.[19] The comments focus instead on the functions of civil

When the harm is caused by an intentional fault, the judge may condemn the wrongdoer, by an especially reasoned decision, to exemplary damages' (Transl. CM).

12 About the Catala Draft in general, see Vogenauer 2009, p. 9–14.

13 The drafters seek to modernise the *Code civil* in order for it to recover its lost status of *ius commune* of the French law of obligation. Catala 2005, § 2.

14 Viney 2005b, p. 143.

15 Béteille Proposal, Exposé des motifs, p. 3.

16 See F. Terré (ed.), *Pour une réforme du droit des contrats*, Dalloz: Paris, 2009, 310 p.

17 Terré 2011, § 3–4.

18 The introductory comments provide no inventory of legal deficiencies justifying the introduction into general tort law of a repressive mechanism, neither explanations as to the adequacy of punitive damages to the problems identified, nor about the method(s) according to which the drafting group worked, nor do they refer to relevant publications on this issue.

19 Shortly before the publication of the *Catala Draft*, Viney pleaded for a combined restitutionary and punitive mechanism conceived to deprive an inflictor from any profit deriving from his or her wrongdoing – a so-called lucrative fault, with a punitive sanction ('*pénalité*') in order to deter subsequent similar wrongdoing. Such a mechanism would stand out, still not abandon, the traditional compensatory vision of civil liability as proclaimed by the *Cour de cassation*. Viney supports that an official recognition

liability,[20] its primary function being a compensatory one while Article 1371 Catala Draft forms as a cautious step towards the admissibility of a punitive function of civil liability.[21]

The Béteille & Anziani report upon which the Béteille Proposal directly builds, is far meatier. It exposes along its 110 pages the principles guiding the reform, identifies the priorities of the reform and formulates for each a series of recommendations. These recommendations are based on a study of positive tort law and the consultation of national stakeholders.[22] It holds a comparative law component which, however, remains limited.[23] No justification for inserting punitive damages within civil liability law is, here also, provided for, still it is indirectly broached. The report notices that serious damaging behaviour such as lucrative faults benefit from a gap flowing from civil and criminal law: the gain obtained by the defendant is neither neutralized by civil liability law, nor sanctioned by criminal law.[24]

One of the distinctive features of the Terré Tort Draft is precisely the impact of comparative law,[25] first, on the identification process of the striking features of French tort law and corresponding reform priorities and second, on the proposed solutions.[26] The influence of comparative law on the treatment of lucrative faults and punitive damages is tangible.[27] A justification for the insertion of exemplary damages is to punt an end to the judicial practice of covert punitive damages.[28]

The doctrine prior to the Catala Draft had already paved the way for the discussion about the introduction of punitive damages and provided for justifications.[29] The debate closely involved lucrative faults. A common perception is that, in response to lacuna's in

of punitive damages, now applied in a disguised way, would lead to the adoption of an adequate regime insofar that its scope of application would be clearly defined, excesses could be sanctioned and insurability against punitive awards be excluded. This, as a result, would reinforce the efficacy of such a mechanism as well as legal security in general. A major motive behind the proposed incorporation into the Civil Code of punitive damages is thus to bring the theory of the law of the book in accordance with the practice of law in action. The required adequacy between the compensation awarded, on one hand, and the harm suffered, on the other hand, the so-called *réparation intégrale* rule which excludes any influence of the seriousness of the infringement on the amount of damages, has indeed been in practice bypassed either by lower courts judge or the legislator. See Viney 2005a, § I.

20 Viney 2005b, p. 148.

21 Though not recognised as a specific function of tort law, preventive function is indirectly admitted in Article 1369–1 Catala Draft dealing with specific relief (Article 1369–1 Catala Draft).

22 See Anziani & Béteille 2009, p. 129 ff.

23 The Anziani & Béteille report contains a brief description of punitive damages under common law, Anziani & Béteille 2009, p. 29.

24 Anziani & Béteille 2009, p. 80 & 88. The reporters further assert that the claim for the introduction of punitive damages would not be as loud if criminal courts would award higher amount of civil damages to victims of a criminal offence. The reporters observe that criminal judges award far lower amount of damages than their civil counterparts, as a result one of their recommendations is to tackle this 'cultural difference'. Anziani & Béteille 2009, p. 89. Comp. with Law Commission Report § 1.15.

25 The other one being the choice for restructuring of French tort law.

26 See Rémy 2011, p. 43 and Rémy & Borghetti 2011, p. 67.

27 Rémy-Corlais 2011, p. 200–201 & p. 222.

28 See below § 3.1.3.

29 See e.g. Carval 1995, Fasquelle 2002, § 21–35, Jourdain 2002, § 7–11, Viney 2002, p. 66.

civil and criminal legislation,[30] lower civil judges have, when assessing the award for non-pecuniary losses and exercising thereby their sovereign power of appreciation, taken into account the seriousness of the defendant's conduct.[31] Codifying punitive damages would end the legal uncertainty created by such covert practices[32] and reel off the law in the books and the law in action. Punitive damages are considered an effective legal tool due to their dissuasive effect on potential wrongdoers,[33] as well as their incentive impact on victims as well.[34] The discussion also points at possible risks linked to punitive damages, such as the possible undue enrichment of the victim and an increase in damages claim which would plagued lower jurisdictions.[35] Though civil fines would avoid such consequences as they are paid to the public treasury, this device, due its maximum amount, lacks flexibility.[36]

2.3. Punitive Damages Provisions: Main Focus and Context

The draft provisions on punitive damages introduce a significant exception to the *réparation intégrale* principle which all three drafts propose to codify.[37] Though significant, because this exception acknowledges the punitive function of civil liability in addition to its traditional compensatory one, it is nevertheless meant to apply in limited cases.

Article 1386–25 Béteille Proposal and Article 1371 Catala Draft focus both on so-called lucrative faults. Article 1371 Catala Draft lacks precision as to its exact scope of application and the assessment of the damages award, leaving its further interpretation to the judge.

Article 1386–25 Béteille Proposal is, in contrast, characterised by a clear-cut scope of application and an upper limit for the amount of damages to be allocated. As the principle of full reparation (*réparation intégrale*) dictates, the seriousness of the damaging

30 Jourdain 2002, § 8, Viney 2002, § II.A.

31 See e.g. Jourdain 2002, § 7, Fasquelle 2002, § 21–24 (case law analysis), Borghetti 2009, § 22–30 (with case law illustrations). Apparently one also encounters such practices in Italian and German civil case law, see e.g. Anziani & Béteille 2009, p. 84.

32 Fasquelle 2002, § 24.

33 Viney depicts the full reparation principle, which ignores the seriousness of the defendant's conduct and the gains he or she made by his or her wrongdoing, as an incentive to commit an infringement ('*un pousse-au-crime*)', Viney 2002, § 1. She further stresses the shortcoming of that principle as 'it is delusion' when applied to non-pecuniary losses.

34 Fasquelle 2002, § 27.

35 *Ibid.*, § 35.

36 About civil fines see above note 3. Fasquelle 2002, § 31. For a comparison between the device of civil fines and punitive damages see Behar-Touchais 2002, esp. § 15–23.

37 The *réparation intégrale* rule, a founding principle placed ahead of the reparation chapter of each drafts, is stated at:
Article 1370 in the *Catala Draft* which purpose is 'to place the victim as far as possible in the position he would have been in had the act created liability not occurred' whereby the damages awarded 'should produce neither profit nor loss for the victim', Transl. Levasseur 2008 p. 86;
Article 1386–24 in the Béteille Proposal which reads: 'L'allocation de dommages et intérêts a pour objet de replacer la victime dans la situation où elle se serait trouvée si le fait dommageable n'avait pas eu lieu, de sorte qu'il n'en résulte pour elle ni perte ni profit. (…)';
Article 49 in the *Terré Tort Draft* whereby 'La victime d'un dommage peut *en général* demander réparation de son entier préjudice (…). La réparation tend à placer le demandeur dans la situation où il se trouverait si le dommage ne lui avait pas été causé; il ne peut *en principe* en résulter pour lui ni perte, ni profit' (ital. CM).

behaviour is, in principle, not taken into account when determining the amount of damages to be awarded, thereby excluding its punitive character. Repressive trends in French case law and legislation, however, tempers the unqualified character of this founding principle, as the Béteille & Anziani report observes. While the consultation conducted by the First Chamber Working Group on Tort Law does not reveal any consensus,[38] the reporters nevertheless see punitive damages as an 'interesting innovation' whose introduction into French private law ought to be 'moderate'.[39] The key issue to them is not whether a repressive mechanism like punitive damages has a place within French civil liability, but rather whether such a legal mechanism ought to be generalised. Despite the reporters' efforts to meet the criticism expressed against Article 1371 Catala Draft, reluctance to this innovation remains.[40]

In the Terré Tort Draft, punitive damages (Article 69) are directed against intentional violation of one's moral integrity. The Terré drafting group indeed views the restitution of profits as an adequate sanction against lucrative faults of non-contractual (Article 54 *Terré Tort Draft*) and contractual basis (Article 120 *Terré Contract Draft* dealing with *dol*).[41]

3. Detailed Comparative Analysis of Competing Provisions

In the following paragraphs the distinctive features of the three competing punitive damages provisions will be compared. Attention will be paid especially to the damaging behaviour they aim at sanctioning, the setting off of the damages award, its beneficiaries and insurability.

3.1. Damaging Behaviour: Lucrative Faults versus Infringement of One's Moral Integrity

3.1.1. The Imprecision of Article 1371 Catala Draft

Article 1371 Catala Draft formulates a *general rule* that applies to 'manifestly deliberate [faults], particularly (…)' – thus not exclusively – to *lucrative faults*.[42] For punitive

38 Interviews were conducted with economic actors representing the business sector as well as consumers' interests, and also with legal practitioners, magistrates and representatives of judges' organisations. Academics were also interviewed among which drafters of the Catala Draft. These interviews reveal a total absence of consensus about punitive damages and an opposition between, on the one hand, academics which are rather favourable towards the introduction of punitive damages in French law and, on the other hand, economic actors and legal practitioners which are globally reluctant to it. Though the necessity of legislative action against certain damaging behaviours such as lucrative faults is widely shared, doubts rise about punitive damages as being the appropriate legal tool to combat these. Anziani & Béteille 2009, p. 79–100.

39 Anziani & Béteille 2009, p. 88, § 4.

40 See Vignolle 2010, § II.B, who strongly opposes the vision that civil liability might endorse a punitive function.

41 See above note 5.

42 Levasseur translated the expression *faute lucrative* by 'fault whose purpose is monetary gain' which is an incorrect translation because it departs from the definition given to this notion by the Catala Draft. This translation unduly suggests that the application of Article 1371 supposes that the wrongdoer not

damages to be awarded is further required that the damaging behaviour opens a right to compensatory damages. Furthermore, aAArt. 1371 Catala Draft is non-sector specific and applies to contractual breach as well as to non-contractual wrong (Article 1340 Catala Draft). It clearly breaks away from the *réparation intégrale* principle as it associates the damages award with the seriousness of the behaviour of the inflictor.[43]

Article 1371 Catala Draft introduces two new types of '*faute*', that are the '*faute manisfestement délibérée*' and the '*faute lucrative*', the latter being a species of the former. The *faute lucrative* is described as 'a wrongdoing, the beneficial consequences of which – for the wrongdoer – are not neutralised by the sole compensation of the harm caused' (transl. CM).[44] The general category of 'manifestly deliberate fault' is a notion which does not originate from the Civil Code, nor case law. Although new, this category is characterised neither by a Draft provision, nor by the preliminary comments and remains therefore imprecise.[45] One could associate this category with – but not assimilate it to – already existing concepts, such as the notion of *faute volontaire,* a *deliberate* wrongful *act*, or *faute intentionnelle*, whereby the inflictor intentionally sought the harmful consequences of his wrongful behaviour.[46]

This lack of precision led to heavy criticism from e.g. the *Cour de cassation*.[47] What is here at stake is obviously, from the perspective of the inflictor, the exact determination of behaviour falling into the grip of punitive damages, thus legal security. Those who point out such imprecision as to Article 1371's scope of application, fear that its interpretation, *de facto* imposed on the judge, would pave the way to inconsistencies and even, arbitrary punitive damages awards.[48]The deterrent impact of this mechanism would be sensibly limited if the victim is required to prove the *intention* of the wrongdoer to profit from his damaging behaviour, as proving such intention is difficult. Such

only wittingly committed a damaging act but also intended the resulting financial profit. Article 1371 Catala Draft remains unclear on that point.

43 Chagny 2006, § 8, Méadel 2007, § 5.

44 The concept is – only – defined in the preliminary comments, Viney 2005b, p. 148. The characterisation of a fault as lucrative thus does not include the *intention* of the wrongdoer to financially profit from his or her behaviour. A distinctive characteristic of this provision lies in its non-sector specific scope of application.

45 The picture becomes even more blurred when looking at Viney's position expressed prior to publication of the *Catala draft*. Indeed, according to her, punitive damages should *not* sanction *fautes intentionnelles* from which the wrongdoer did *not* obtain any *profit*, because these faults are already sanctioned by their non-insurability (Article L. 113–1 Insurance Code). Viney 2005a, § I. Given its formulation, Article 1371 primarily aims at 'manifestly deliberate fault' and possibly applies to *faute intentionnelle* which would then fall within this general category. Méadel 2007, § 5.

46 See e.g. Fabre-Magnan 2004, § 279. The concept of *faute volontaire* had lost material relevancy in present civil liability, see e.g. Fabre-Magnan 2004, p. 758–761.

47 For this very reason, this concept as well as the concept of *fautes lucratives* is not only labelled as imprecise but firstly as improper by the *Cour de cassation*. Rapport Cour de cassation 2007, p. 68–69. According to the Supreme Court, drafters should avoid departing from existing concepts of fault, a quite conservative approach as it implicitly excludes innovations on that matter.

48 Rapport Cour de cassation 2007, p. 68–69, Méadel 2007, § 10, Dreyer 2008, § 7, Pierre 2010, § I. The latter also pinpoints the twofold requirement of a manifestly and deliberate fault, which excessively narrows the application scope of Article 1371 Catala Draft to 'intelligent faults' and faults 'nurtured by the wrongdoer'.

requirement would subsequently restrict the availability of punitive damages and thereby the protection of victims.

In a similar vein, Pierre highlights the twofold requirement of a manifestly *and* deliberate fault, which, he views, limits the application of Article 1371 Catala Draft to 'intelligent faults' and faults 'nurtured by the inflictor'.[1] A more general issue is also the difficulty in establishing the lucrative character of a fault and the causality between the harmful act or contractual breach, on one hand, and the exact resulting profit for the wrongdoer, on the other hand.[2]

More fundamental criticism relates to the rupture with civil liability founding principles operated by Article 1371: sanctioning the seriousness of the behaviour of the inflictor conflicts with the neutrality of the damages towards the gravity of the wrongdoing. This approach is considered as contrary to the ethic of civil liability because it would turn civil liability into 'para-criminal' liability.[3]

The drafters of Article 1386–25 Béteille Proposal took account of the criticism, but headed, nevertheless, into the same direction.

3.1.2. Article 1386–25 Béteille Proposal: a Clear Response to Article 1371's Shortcomings

Article 1386–25 Béteille Proposal applies (1) when the law expressly provides so, (2) the prejudice results from a deliberate wrong (*faute délictuelle volontaire*) or a deliberate breach of contract (3) opening right to compensatory award for the victim and (4) leading to profit for the responsible wrongdoer respectively the promisor. Contrary to the Catala Draft, the Béteille Proposal favours a sector-specific approach as punitive damages only apply 'in cases where, the law expressly states so'. Article 1386–25 characterises in general terms the damaging behaviour to be punished, thereby justifying its incorporation into the *Code civil*.

An obvious consequence of Article 1386–25's formulation is that the effective introduction of punitive damages into French civil liability requires further legislative action. Given the reluctance towards this alien legal concept,[4] such a requirement paves the way for postponement.

In contrast with Article 1371 Catala Draft, under Article 1386–25 punitive damages do not sanction all lucrative faults. Taking over a fundamental criticism against Article 1371, the Béteille & Anziani report excludes a *general* punitive damages provision on the ground that it would seriously undermine the fundamental distinction between civil and criminal liability.[5] The reporters also question that punitive damages have, in essence, a general preventive function against all lucrative faults and thereby oppose the necessity

1 Pierre 2010, § I.
2 Dreyer 2008, § 8.
3 Mésa 2009, § I-A.
4 See e.g. the reluctance expressed by several consultees in Anziani & Béteille 2009, p. 86–88.
5 Such general provision would also re-introduce the concept of private penalty (peine privée) which French law has continuously combated. The Report further construes the call for a general punitive damages provision as a supposed answer to the unjustified differences between damages awarded by criminal judges compared to their civil counterparts. The reporters recommend – as better solution –

of a *general* punitive damages provisions.[6] Instead, they identify specific legal fields where punitive damages could apply as in those fields, the reporters view,[7] neither civil nor criminal law insure a just compensation for the harm suffered and an efficient sanction of the inflictor. Thanks to its general characterisation of deliberate and lucrative faults, this provision is meant to set out a framework for further legislation and judicial action and to ensure the internal coherence of the legal policy against such behaviour. Two of the scarce commentators of the Béteille & Anziani report challenge the sector-based approach. One commentator fears that contract and consumer law will not benefit from this innovation.[8] The other pleads that the general application of punitive damages would free the judge from any reluctance to allocate such awards which he considers desirable.[9] If, as Article 1386–25 states, further sector-specific legislation is required, its major impact is therefore beyond all the official recognition, in line with the Catala Draft, and also, therefore, of the repressive function of civil liability beside its traditional compensatory role.[10]

Article 1386–25 targets deliberate *acts* (wrongdoing resp. breach).[11] It does not require that the inflictor intended to make profit out of the wrongdoing respectively breach.[12] By employing an existing and well characterised concept, the drafters avoid the lack of precision that Article 1371 was criticised for.[13] This choice also responds to conservative criticism of the *Cour de cassation*.[14]

The central role of lucrative faults in both Article 1371 Catala Draft and 1386–25 Béteille Proposal reveals a line of continuity but reluctance towards the codification of

that damages awards allocated by criminal judges – when also deciding a civil claim – at least equal those of their civil counterparts. See Anziani & Béteille 2009, p. 89–90, Recommandation n° 22.

6 The reporters consider punitive damages as ineffective in cases where victims, especially in consumer conflicts, have no economic interest to act in justice due to the low damages award expected compared to the high costs of a lawsuit. The introduction of class actions instead would tackle these situations. Anziani & Béteille 2009, p. 91–93, Recommandation n° 23.

7 First mentioned are personality rights relating e.g. to ones privacy or reputation, secondly competition law and also environmental law, Anziani & Béteille 2009, p. 93–95.

8 Mésa 2009, § I.B.

9 Pierre 2010, § I.B.1. This author further signals the risk that a cumulating of sector-based provisions might create distortions and incoherence.

10 Outside these fields, it could provide a ground for lawyers to contest the high level of damages allocated to a victim compared to the harm suffered, especially in presence of a lucrative fault and when the judicial decision does not indicate that the damages awarded aim at compensating the material and immaterial harm suffered as well. They could then pretend that, given the substantial amount of damages allocated to a victim, the judge covertly awarded punitive damages contrary to Article 1386–25. Article 1386–25 Béteille Proposal requires indeed the judge awarding punitive damages to motivate its decision.

11 About the concept of *faute volontaire,* see above § 3.1.1. One first notice that the expression *faute lucrative*, present in Article 1371 Catala Draft, has here disappeared from Article 1386–25 Béteille Proposal and has instead been replaced by a description which strongly resembles though the definition the Catala Draft opted for.

12 As a result, situations where the author of an unwitting harmful act, profits from it, fall out of Article 1386–25 scope.

13 See above § 3.1.1. The burden of the proof of the *faute volontaire* still implicitly lies on the victim but could be reversed in the sector specific legislation.

14 See above footnote 36.

this concept nevertheless remains. Commenting on the Béteille & Anziani report, Vignolle, a legal practitioner, contests the need for legislative recognition of the concept of lucrative faults. He suggests instead that, when lucrative faults do not qualify as a criminal infraction, which, in his view, they usually do, judges treat these as a fraudulent breach of contract (*faute dolosive, Article 1150 Code civil*). A victim might on this ground claim and obtain compensation for foreseeable and unforeseeable damage as well as for the special and immaterial harm suffered which, according to Vignolle, renders any recourse to punitive damages superfluous.[15]

3.1.3. Articles 68 and 69 Terré Tort Draft: a Total Shift of Focus

Intentional infringement of one's moral integrity and not lucrative faults are at the heart of the punitive damage provision of the Terré Tort Draft.

If this draft also deals with *fautes lucratives* (Article 54 Terré Tort Draft) these are sanctioned by the siphoning-off of the inflictor's profits.[16] The Terré Tort Draft favours restitutionary above punitive damages as an adequate remedy against lucrative faults,[17] on the ground that punitive awards are excluded by the Draft Common Frame of Reference and might be considered as contrary to public order according to the Rome II Regulation.[18]

Article 69 Terré Tort Draft, conditions allocation of punitive damages to a twofold requirement: an *intentional* infringement and an infringement of one's *moral integrity* which comprises of e.g. one's dignity, honour, reputation or privacy. Here again, the seriousness of the damaging behaviour – its intentional character combined to a specific category of infringement – is taken into account for the assessment of the damages award, this being contrary to positive law. To justify the resulting restricted application of punitive damages, the drafters observe that such approach is in line in with English common law where they are awarded in very limited cases.[19]

The Drafters consider that rights relating to personal integrity deserve, as it is now the case in positive law, a specific and high level of protection (Article 68 Terré Tort Draft),[20] but also, if not most of all, a *declared* judicial policy of protection.[21] According to the traditional full reparation principle, damages ought to compensate no less, but no more than the harm caused. The assessment of damages becomes highly problematic, however, when the infringement leads to non-patrimonial prejudice, as in the case of

15 Vignolle 2010, § II.B.

16 See for general comments Rémy & Borghetti 2011, p. 82.

17 Rémy-Corlay, member of the drafting group, observes that, in France, restitutionary and punitive award tend to be mixed up because they depart from the founding principle of full reparation. Rémy-Corlais 2011, p. 200.

18 See Comment C on Article VI.-6:101 DCFR and cons. 32 of Regulation 864/2007.

19 *Ibid*.

20 Article 9 Code civil states that these rights have constitutional value. According to constant case law, the sole proof of the infringement is sufficient to ground a compensation award (e.g. Cass. civ. 1e, 5 novembre 1996, Bull. civ. I, n° 38).

21 Rémy & Borghetti 2011, p. 86.

infringement of one's moral integrity.[22] Lower court judges assess non-patrimonial harm by using their sovereign power of appreciation and are not required to specify or explain their decision as to the amount allocated.[23] Article 69 Terré Tort Draft echoes the perception that lower judges presently use that sovereign power, and subsequent absence of a duty to give reasons, to inflict high amount of damages in case of non-pecuniary damage in order to sanction the seriousness of certain damaging behaviour while, on the face, they are abiding to the mandatory principle of full reparation.[24] By adopting a punitive damages provision, the Terré Tort Draft expressly aims at officially recognising that the reparation of harm caused by an infringement of one's moral integrity falls outside the scope of the full compensation principle.[25] The drafters' purpose here is to end:

> 'l'hypocrisie actuelle, qui se contente d'imposer au juge du fond le respect formel du principe de réparation intégrale et le laisse arbitrer librement la mesure de la réparation, sous couvert du principe d'appréciation souveraine'.[26]

For its drafters, Article 69 Terré Tort Draft is meant to clarify and to consolidate an existing judicial practice.

3.2. The Assessment of the Punitive Award

Article 1371 Catala Draft foresees that a wrongdoer respectively promisor who benefits from her manifestly deliberate fault '*may* be ordered to pay *punitive damages* besides compensatory damages'. The proposed sanction is thus additional to compensatory award and not automatic but to be decided by the judge. Here again, Article 1371 as well as the '*Exposé des motifs*' are silent as to the exact characterisation and calculation of the award.[27] It is, consequently, for the judge to determine 1) whether the award be allocated 2) whether it should be based on e.g. the harm caused to the victim or the subsequent benefit made by the inflictor or promisor and 3) according to which proportion. Article 1371 imposes a duty to justify specifically his or her decision. The punitive character of this award derives from the fact that it is additional to compensatory damages and directed against a specific category of harmful behaviour.

22 Rémy-Corlais 2011, p. 222.

23 See e.g. Fabre-Magnan 2004, § 339, Le Tourneau & Cadiet 2007, at § 2511: 'C'est une vérité incontestable pour la Cour régulatrice que le juge du fond justifie suffisamment l'évaluation d'un préjudice par le seul énoncé du chiffre retenu, sans être tenu d'en préciser les divers éléments (…), chiffre dont l'équivalence avec le préjudice causé est simplement affirmé, même s'il s'agit [de l'euro] dit symbolique'. According to these authors, the Supreme Court even encourages lower judges, by its judicial policy, not to disclose the *underlying assessment of their* awards for non-pecuniary losses. See Le Tourneau & Cadiet 2007, at § 2512.

24 See above § 2.2.

25 Rémy & Borghetti 2011, op.cit.

26 *Ibid*.

27 In her comments prior to the publication of the Draft, Viney is supportive of a penalty (*pénalité*) combined with a benefit-based award – she labelled as being punitive – depriving the wrongdoer of all profit gained as a result of his wrongdoing or contractual default. Viney 2005a, § I.

This proposition encountered much critical response, mainly of a fundamental nature, while some comments concentrated on more technical aspects. In general, opponents do not contend the necessity of intervening against lucrative faults but fiercely oppose the introduction of punitive damages into French civil liability where compensation of the harm suffered is central and not punishment of a given behaviour. The adoption of such a punishment mechanism introduces, in their view, a confusion between the respective functions of civil liability law and criminal law.[28] For proper legislative action against lucrative faults, some opponents refer to criminal and administrative law arguing that rather than reforming civil liability law, criminal law ought instead to be reformed in order to tackle the phenomenon of lucrative faults.[29] Alternative solutions within the frame of civil liability, however, have been suggested. Méadel favours a mechanism which would take into account the benefit made by the wrongdoer.[30] Pierre, though not fundamentally opposed to punitive damages, strongly disapproves of Article 1371 for not specifying the mode of calculation of the punitive award.[31] He views the absence of an upper limit as a wide open doorway to the ordering of excessive awards, a threat to 'the economic equilibrium of civil liability'. The specific motivation duty that Article 1371 imposes on judges – and subsequent judicial control – is apparently not considered as a sufficient safeguard against such judicial arbitrariness.

Article 1386–25 Béteille Proposal labels, just like Article 1371 Catala Draft, the remedy to apply in case of lucrative faults as punitive damages. This award is, as in Article 1371, non-automatic, additional to compensatory damages and the decision whether such an award should be allocated is entrusted to the judge who Article 1386–25 expressly requires to render 'a reasoned decision'. The calculation mechanism of punitive awards is a major concern expressed by consultees in the Béteille & Anziani report.[32] The fundamental difference between both draft provisions relates subsequently to the assessment of a punitive damages award. Article 1386–25 defines its basis and delimits its amount, thereby strongly restraining the discretionary power ascribed to the judge under Article 1371 Catala Draft.

Article 1386–25's explicit *limitation of the punitive award* to twice the amount of the compensatory damages is inspired by fear of excessive damages awards.[33] Under French law, the assessment of damages is, as earlier mentioned, a matter of discretionary power of lower courts. Given the absence of judicial control by the Supreme Court on that factual aspect, the reporters consider it essential to limit statutorily the amount of

28 Rapport Cour de cassation 2007, § 92, Dreyer 2008, § 13.

29 Rapport Cour de cassation 2007, p. 69 in fine, Dreyer 2008, § 15.

30 Méadel [Méadel 2007, § 26] who is also critical towards sanctioning lucrative faults by the allocation of punitive damages nuances, though, the alleged incompatibility between this punitive mechanism and the primary function of liability as incarnated in the founding principle of *réparation intégrale*. To her, the incompatibility argument is little convincing since the *réparation intégrale* principle is not mandatory (*d'ordre public*), as attested by the many legislative provisions which depart from it. See on that issue e.g. Borghetti 2009, § 3–21.

31 Pierre 2010, § II.B.

32 Anziani & Béteille 2009, p. 95.

33 *Ibid*, p. 97.

punitive damages that a judge may award.[34] Consultees also warned for a possible rebuff of this provision by the Constitutional Council if the amount of punitive damages is not limited in one way or another.[35] Coming to the *basis for assessment of the punitive damages*, the Béteille & Anziani report recommended that it be proportional to the compensatory damages allocated, a recommendation to which Article 1386–25 abides. The purpose of this provision, however, is to sanction and deter deliberate harmful behaviour from which one had financially benefited. One would thus expect that the calculation basis for punitive damages would be the benefit made rather than the compensatory damages.

Several authors question the dissuasive effect of punitive damages as designed in Article 1386–25 Béteille Proposal.[36] Mésa pleads for an alternative solution: the principle of *full restitution*.[37] Restitution is not only faithful to the founding principle of full reparation, but its deterrent impact on lucrative faults is also stronger as it deprives the inflictor of the subsequent profits.[38] Again, the punitive device of Article 1386–25 bases the award calculation on the harm caused, not on the wrongful profits whereas it purports to impede wrongful lucrative behaviour.

Article 69 Terré Tort Draft, first provides that in case of an infringement of one's moral integrity, 'the form and amount of damages may be symbolic'. It then states that when such infringement is intentional, 'the judge may condemn the inflictor (..) to an exemplary reparation'.[39] The sanction is not automatic but to be decided by the judge and is not conditioned to any compensatory award. It is for the judge to decide whether the award be allocated and what its amount ought to be.

The decision as to the *allocation* of exemplary damages depends on the discretionary power of the judge, a common scheme between all three competing drafts. Furthermore, the Terré Tort Draft does not specify any *calculation basis*, nor provide for an upper *limit* of the punitive award. Despite critical comments on Article 1371 Catala Draft on these two aspects, the Terré drafting group opted for a similar approach. Indeed, in contrast

34 *Ibid*, p. 96.

35 *Ibid*, p. 87. Punitive damages might be assimilated to a repressive mechanism, all the more if it is insufficiently delimited. It should thus conform to the required proportionality between penalty and incriminated behaviour (Article 8 of the Déclaration des Droits de l'Homme) to avoid being declared unconstitutional by the Constitutional Council. The reporters took account of this remark, Anziani & Béteille 2009, p. 96.

36 Vignolle 2010, § I.A., Mésa 2009, § II.A.

37 Mésa 2009, § II.A, The latter is indeed the mirror image of the first since it also aims at restoring the *status quo ante* but focuses on the wrongdoer instead of the victim. This change of perspective presents several comparative advantages. Contrary to punitive damages, a restitutionary award contains no repressive component and appears therefore compatible with the traditional compensatory function of civil liability and abides as well to the constitutional principle of *légalité des peines*. The author also sees as a further advantage the fact that the seriousness of the fault has, in line with the full reparation principle, no impact on the assessment of the restitutionary damages, since the focus is on the gain realised by the defendant.

38 Mésa 2009, § II.B.

39 Article 69 uses the expression 'réparation *exemplaire*' and not '*dommages et intérêts punitifs*' in contrast to the two other competing draft provisions. It is in line with the recommendation of the British Law Commission report on that issue, see Law Commission Report, recommendation n° 16, p. 184.

with the Article 1386–25 Béteille Proposal,[40] Article 69 al. 2 Terré Tort Draft fully entrusts the assessment of the amount of exemplary damages to the wisdom of the lower judge. But Article 69 requires an especially reasoned judicial decision, like Article 1371,[41] with a view to enable its judicial control by upper courts.[42] The Terré drafters apparently consider this requirement as a sufficient safeguard against the risk of arbitrary damages award, often associated with punitive damages and feared by many French commentators. Article 1386–25 only imposes a 'reasoned decision', favouring thereby a statutory to procedural protection against such risks.

None of the competing provisions indicate if the victim should claim punitive damages, due to the reparatory function of the award, or whether the initiative belongs to the judge, due to the punitive character of the award.

3.3. The Beneficiaries of the Award

When it comes to the designation of the beneficiary of the award to be paid by the inflictor, the French legal community seems even more divided than regarding the previous items.

Once more, Article 1371 Catala Draft stands out by its imprecision. Article 1386–25 Béteille Proposal echoes critical comments toward the latter but heads nevertheless for the same direction: the plurality of beneficiaries. This approach might appear quite peculiar to common law lawyers. The Terré Tort Draft here again differentiates itself by pointing out the victim as the exclusive beneficiary of the punitive award.

Article 1371 Catala Draft states that the judge, when ordering the payment of punitive damages 'may direct *part of* such damages to the Treasury (Ital. CM)', thereby implicitly providing that the – other part of the – award is to be primarily allocated to the victim, as compensatory damages are.[43] This choice of beneficiaries, about which the drafters comments remain silent, unleashed mainly negative reactions. Commentators oppose the allocation of an additional award to the victim and also contest the Treasury being an appropriate beneficiary. To Dreyer, the allotment of a punitive award to the victim potentially leads to his or her unjust enrichment.[44] The *Cour de cassation* further signals its non-conformity with the compensatory purpose of civil liability where neutrality of the award for the victim is central.[45] Following a more pragmatic approach, Chagny positively views the allocation of punitive damages to victims as it constitutes an incentive for the same to intervene against lucrative, wrongful behaviour. Civil liability serves then as a private enforcement tool which directly benefits the victim but indirectly the community

40 The formulation of Article 1386–25 Béteille Proposal reveals the drafters' intention to address the risk of arbitrary judicial decisions.

41 Departing from positive law, all competing drafts enjoin the judge allocating punitive or exemplary damages to motivate his or her decision. Article 1371 Catala Draft ('specific reason') and 69 al. 2 Terré Tort Draft ('*décision spécialement motivée*') even impose a specifically reasoned decision.

42 Rémy & Borghetti 2011, p. 86.

43 Comp. with Méadel 2007, § 23–24. As Article 1371 does not explicitly mention the victim as beneficiary of the punitive award, Méadel sees the Treasury as the sole beneficiary.

44 Dreyer 2008, § 9, contra Pierre 2010, § II.A.2.

45 Rapport Cour de cassation 2007, § 92, p. 69.

as well.[46] As to the allocation of the punitive award to the Treasury, the *Cour de cassation* characterises it as 'weird'.[47] If implemented, it would create a confusion between the concept of punitive damages as understood in common law and the device of civil fines (*amende civile*) with which French private law is familiar.[48] The highest Court thus suggests that the punitive award be instead assigned to a compensation fund (*fonds d'indemnisation*).

Article 1386–25 Béteille Proposal also foresees a plurality of beneficiaries: part of the punitive damages is to be directed to the victim and another part to a fund which purpose is to compensate losses as suffered by the victim. In the absence of such fund, its share should benefit the Treasury. The Béteille & Anziani Report revealed that consultees were strongly divided on the issue of the beneficiaries of the punitive damages.[49] Despite the lack of consensus, the Béteille & Anziani Report recommends that the award be allocated in part to the victim. The reporters deem it to be of the essence of punitive damages that the victim be a beneficiary. Still they partly side with the *Cour de cassation* when proposing that part of the award be allocated to an indemnification fund, prior to public treasury. Also contested by the consultees is the choice, in Article 1371 Catala Draft, to charge the judge with the decision whether or not to direct part of the award to another beneficiary than the victim.[50] Article 1386–25 Béteille Proposal diverges slightly from Article 1371 Catala on that point too: the plurality of beneficiaries is codified while the designation of the beneficiary fund and the proportion of the award it is to receive is a matter of sovereign power of the lower judge. Again, the Béteille Proposal builds upon Article 1371 Catala Draft but attempts to avoid its shortcomings.

Neither the text of Article 69 Terré Tort Draft, nor the drafters comments, explicitly designate the beneficiary of the punitive damages. It clearly follows though from the system of Articles 68 and 69 Terré Tort Draft. According to Article 68 Terré Tort Draft, any person can obtain reparation of (non-)patrimonial harm caused by the infringement of his or her moral integrity. The originality of the Terré Tort Draft lies in the fact that the victim can be a private individual as well as a legal entity. Legal entities, Article 68 Terré Tort Draft stipulates, may claim for reparation, provided, however, they are the victim of serious fault (*faute grave*). It then follows from Article 69 Terré Tort Draft that the (victim's) reparation right, based on Article 68 might either be a symbolic award or exemplary damages. Contrary to both the Catala Draft and Béteille Proposal, the victim, according to the Terré group, is thus the sole beneficiary of the exemplary damages. This constitutes a far stronger incentive for the victim whose moral integrity has intentionally been damaged to take legal action; thereby increasing the deterrent impact of this provision.

46 Chagny 2006, § 14, p. 1226.

47 It furthermore renders obscure the purpose aimed at by this repressive mechanism, Rapport Cour de cassation 2007, § 92, p. 69. See also Méadel 2007, § 24.

48 See supra note 3.

49 A consumer organisation pleads for the exclusive allocation of the punitive award to the victim, see also Pierre 2010, § II.A.2. On the contrary, the *Cour de cassation* and Ministry of Justice exclude the victim as a beneficiary who would then enjoy a double compensation as, in practice, the seriousness of the behaviour often influences the compensation award of non-patrimonial harm. A critic often heard is that allocating punitive damages to the victim constitutes a private penalty. In order to avoid that, many suggested that the punitive damages be instead exclusively directed to a specific indemnification fund. Anziani & Béteille 2009, p. 98.

50 Anziani & Béteille 2009, p. 99.

3.4. The Insurability Issue

Before looking at how the competing drafts deal with the insurability of punitive award, attention must be paid to the legal context of that issue. Especially relevant here is Article L.113–1 of the Insurance Code, the second paragraph of which provides that 'the insurer shall not be answerable for losses and damage caused by the insured person's intentional wrongdoing or fraud'. As previously mentioned, the notion of intentional wrongdoing (*faute intentionnelle*) means that not only was the damaging behaviour deliberate (*faute volontaire*) but the wrongdoer also intended the subsequent damaging harm.[51]

Article 1371 Catala Draft clearly settles this issue by stating that '[p]unitive damages may not be the subject of a contract of insurance'. In contrast, Article 69 Terré Tort Draft is silent on that matter. However, since it requires an *intentional* wrongdoing for the allocation of exemplary damages, the non-insurability against such punitive award derives from Article L. 113–1 Insurance Code and does not need to be expressly provided for in the reform draft.

Article 1386–25 Béteille Proposal is also silent on that aspect, although the Béteille & Anziani report pays attention to it.[52] Consequently, one could be insured against punitive award sanctioning his or her deliberate damaging behaviour as long as any intentional wrongdoing cannot be proved.

4. Conclusion

Presently, the introduction into French civil law of punitive or exemplary damages is envisaged by three competing reform drafts of the *Code civil*. The punitive damages provision of the Béteille Proposal could be depicted as an improved version of the corresponding provision of the Catala Draft. In short, the Béteille Proposal operates a compromise between the call from university scholars for punitive damages and the fear from legal practitioners and the business sector for excessive and arbitrary damages awards. Its punitive damages provision is indeed sector-based and designed to avoid excesses through the limitation of the punitive award and mandatory disclosure of the judge's reasoning, while the award's beneficiaries range from the victim, an indemnification fund to the public treasury.

51 See above, footnote 33.

52 The reporters are not opposed to the insurability against punitive damages condemnation, while the consultees are divided on that issue. Arguments against insurability put forward by consultees are many. It first would be contrary to public morals according to Article 6 Civil Code which stipulates that 'Statutes relating to public policy and morals may not be derogated from by private agreements'. Another argument is that as one cannot insure itself against criminal sanctions, one should neither be allowed to insure itself against punitive damages. The mechanism of punitive damages would lose its deterrent impact if the wrongdoer does not personally take on the sanction told Jourdain to the Law Commission. Conversely the Ministry of Justice considers that the insurance premium against such sanction would be so high that it will itself deter the committing lucrative fault. Furthermore preventing insurability against punitive damages would leave a heavy financial burden on companies and might on the long term lead to relocation of economic activities, Anziani & Béteille 2009, p. 97–98, see also Pierre 2010, § II.A.1.

In contrast, the Terré Tort Draft follows a quite different approach. There, exemplary damages would apply against intentional infringements of one's personal integrity as restitutionary damages are considered a more appropriate tool against lucrative faults. Assessment of an exemplary award is left to the discretion of the judge who is nevertheless required to render an especially reasoned decision, while the award only benefits to the victim.

Opponents to punitive damages invoke their incompatibility with the fundamental principle of full reparation and the disruption their introduction would cause to the frontier between civil and criminal law. Those in favour of – restrictive – punitive damages' codification consider that it would fill in a gap which has led, in the judicial practice, to covert punitive damages award. A declared civil liability policy towards certain serious damaging conducts would enhanced legal security, indeed a punitive damages device would have a dissuasive impact on potential wrongdoers and an incentive effect on victim to claim damages.

Whether a punitive damages provision will end up in the civil code is difficult to say. The phenomenon of lucrative faults, revealing the limits of the full reparation principle, has inspired the incorporation of a punitive damages provision in the two first reform drafts. Discussions prior and following publications of the first drafts focused indeed on lucrative faults. Since the Terré Tort Draft opts for restitutionary damages against lucrative faults, a tool which, in contrast with punitive damages, is compatible with basic reparation principles, the attractiveness of punitive damages might water down.

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PROEF 1